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Case No. 91-542

IN THE

Supreme Court of the United States

October Term, 1991

ELLIS B. WRIGHT, JR., WARDEN, *et al.*,
Petitioners,

v.

FRANK ROBERT WEST, JR.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER*

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*The States joining in this brief are listed in the Appendix to this pleading.

QUESTIONS PRESENTED

The questions presented by Petitioner, Ellis B. Wright, Jr., are as follows:

> I. May a federal court grant collateral relief merely because it disagrees with the good faith reasonable decision of the state courts?
>
> II. May a federal court fundamentally alter the standard established by this Court in *Jackson v. Virginia* and vacate a state conviction on the basis of nothing more than "concern" about a deeply-rooted common law principle that the prisoner never raised in state court?

This brief addresses an aspect of question II.

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INTEREST OF AMICUS CURIAE

The States joined herein as amicus curiae urge this Court to grant certiorari and quash the decision of the United States Court Appeals for the Fourth Circuit below, *West v. Wright*, 931 F.2d 262 (4th Cir.1991). In such decision, the federal court, in granting habeas corpus relief to a state prisoner convicted of larceny, cast doubt upon the continuing vitality of that common-law presumption arising from a defendant's possession of recently stolen property.

As will be demonstrated *infra,* the vast majority of jurisdictions throughout this country continue to apply this presumption or inference, and the *West* court's suggestion that this doctrine has been at all discredited or discarded is not accurate. The Fourth Circuit's intrusion into matters of state law and policy is both unwarranted and unwise, and is of great concern to the States joined herein. Accordingly, amicus urge this Court to grant the petition for review, filed on behalf of the State of Virginia.

ARGUMENT

In the decision at bar, *West v. Wright,* 931 F.2d 262 (4th Cir.1991), the United States Court of Appeals for the Fourth Circuit ordered the granting of habeas corpus relief to a Virginia prisoner, convicted of grand larceny. The court ostensibly reached this result, by examining the sufficiency of the evidence under the standards set forth by this Court in *Jackson v. Virginia,* 443 U.S. 307 (1979). In the course of reaching this result, however, the Fourth Circuit felt compelled to suggest that "a number of federal and states courts" have come to express "discomfort" with the common-law presumption or inference arising from a defendant's possession of recently stolen goods, *i.e.,* that the possessor was a participant in the theft. The Fourth Circuit also maintained that these "federal and state courts" have refused "to countenance further use of the inference as the sole basis for conviction under any circumstance." *West,* 931 F.2d at 267.

The States joined herein as amicus take strong issue with the accuracy of the above statements, and would further maintain that, even if, in fact, this common-law presumption is at all deserving of revision or reconsideration, such action should unquestionably be taken directly by the legislatures and courts of the sovereign states of this nation, and not unilaterally by a federal court of appeals in the context of action upon an individual habeas corpus petition.

In the *West* opinion itself, the Fourth Circuit acknowledges that, "from earliest times," there has existed an inference that one found in possession of recently stolen property was a participant in the theft. *West,* 931 F.2d at 267. Nevertheless, citing primarily to one Pennsylvania decision, the federal court of appeals somehow concludes that the "basic premise of the inference" has been rendered obsolete by "intervening technological and demographic

developments," such that its use has been "severely constrained." *Id.* The Fourth Circuit, without any great enthusiasm, grudgingly concedes that no court has yet rejected the inference "on constitutional due process grounds," but, as noted above, represents that no court, especially in light of *Jackson v. Virginia,* would now uphold a larceny conviction premised solely upon this inference. *Id.*

The Fourth Circuit is simply in error. In fact, at least the following ten (10) jurisdictions have specifically held that evidence of a defendant's possession of recently stolen property, and the inference or presumption arising therefrom, is sufficient to justify denial of a defendant's motion for directed verdict and to allow the jury to resolve the matter of the defendant's guilt or innocence of larceny. *See e.g., Ward v. State,* 280 Ark. 353, 658 S.W.2d 379 (1983) (defendant's possession of recently stolen goods *prima facie* evidence of guilt, and sufficient to sustain conviction); *Winborne v. State,* 455 A.2d 357 (Del.1982) (defendant's possession of recently stolen goods sufficient to sustain conviction of burglary and theft); *State v. Hong,* 62 Haw. 83, 611 P.2d 595 (1980) (defendant's exclusive possession of recently stolen goods sufficient to sustain conviction, if unexplained); *Miller v. State,* 563 N.E.2d 578 (Ind.1990); (defendant's unexplained possession of recently stolen goods supports inference of guilt of theft of that property and is sufficient to sustain conviction); *State v. McFall,* 219 Kan. 798, 549 P.2d 559 (1976) (defendant's possession of recently stolen property sufficient to sustain conviction of theft, where satisfactory explanation not given); *Jackson v. Commonwealth,* 670 S.W.2d 828 (Ky.1984), *cert. denied,* 469 U.S. 1111 (1985) (possession of recently stolen property is *prima facie* evidence of guilt of theft of that property, sufficient to sustain conviction); *State v. Brown,* 744 S.W.2d 809 (Mo.1988) (defendant's unexplained possession of recently stolen property sufficient to support submission of case to jury); *State v. Odom,* 99 N.C.App. 265, 393 S.E.2d 146 (1990)

(denial of defendant's motion to dismiss larceny charge at close of all evidence proper, where state relied upon presumption arising from defendant's possession of recently stolen property); *State v. Deubler,* 343 N.W.2d 380 (S.D.1984) (possession of recently stolen property a circumstance from which guilt of theft may be presumed; fact of such possession alone, if unexplained, sufficient circumstance upon which to rest verdict of guilty); *Sutherlin v. State,* 682 S.W.2d 546 (Tex.Crim.App.1984) (en banc) (unexplained possession of recently stolen property is sufficient circumstance, in and of itself, to convict possessor of the theft of that property).[1]

Obviously, the holdings of these cases are irreconcilable with that of *West v. Wright,* and the Fourth Circuit's assumption that no state court would affirm a conviction of larceny based solely upon evidence of a defendant's possession of recently stolen property, and the presumption or inference arising therefrom, is clearly erroneous. The potential for further conflict on this issue is clear, in that, should those convicted of larceny in the above-cited jurisdictions challenge the sufficiency of evidence supporting their convictions on federal habeas corpus, the federal court presiding over the case may, in derogation of the above precedents,

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1 Additionally, in Utah, § 76-6-402(1), Utah Code Ann. (1990), specifically provides that the unexplained possession of recently stolen property shall be deemed *prima facie* evidence that the person in possession of that property stole it; although the Utah Supreme Court has held that the jury should not be expressly instructed as to this presumption, it would appear that this inference may remain sufficient to support a conviction. *See e.g., State v. Chambers,* 709 P.2d 321, 326-7 (Utah 1985); *State v. Graves,* 717 P.2d 717 (Utah 1986). Further, Maine provides by statute that proof that the defendant was in possession of recently stolen property gives rise to the presumption that the defendant is guilty of theft of that property, *see Me. Rev. Stat. Ann.,* § 17-A 361(2)(1983), *State v. Robinson,* 561 A.2d 492 (Me.1989), and Arizona similarly provides that proof of possession of recently stolen property, unless satisfactorily explained, may give rise to an inference that the person in possession of that property participated in the theft. *See Ariz. Rev. Stat. Ann.,* § 13-2305(1)(1987).

choose to follow the *West* analysis. Accordingly, the States joined herein as amicus curiae urge this court to grant Virginia's petition for review.

It is not, however, simply the jurisdictions set forth above who are affected by the holding of *West v. Wright.* The Fourth Circuit's condemnation of this common-law presumption has truly nationwide consequences, in that practically all jurisdictions in this country utilize the common-law presumption or inference arising from possession of recently stolen property. Cases discussing the rationale for the presumption are truly legion, and one of the most concise discussions is contained in *People v. Shurn,* 69 A.D. 2d 64, 418 N.Y.S. 2d 445, 448-9, (A.D. 2 Dept. 1979):

> The inference to be drawn from the recent and exclusive possession of stolen goods is one of the oldest means of proving identity known to Anglo-American jurisprudence, dating back at least to the seventh century (*see Barnes v. United State,* 412 U.S. 837, 844 n.5, 93 S.C. 2357, 37 L.Ed.2d 380). Its roots in the common law arise from ordinary common sense and practical necessity. Because larceny, among other crimes, is often committed under covert circumstances, direct evidence of the identity of the thief is frequently unavailable to the prosecution (citation omitted). The law fills this void with the common sense view that an innocent man is generally not in the exclusive possession of stolen property soon after the commission of the crime, and it therefore permits an inference that the possessor is the thief.

The fact that many states have, in certain respects, modified this inference, or, at times, required the existence of additional corroborating evidence in order to sustain a conviction, is not a sign of weakness, as the *West* court would

have it, but rather, one of strength. As this Court noted in *Barnes v. United States,* 412 U.S. 837, 845, n.5 (1973), this common-law presumption derives from the laws of pre-Norman England, and it is hardly surprising that, over the centuries, the respective states throughout this nation have, in certain respects, revised the inference, such that its continued usage is consistent with the requirements of due process.

Given the fact that at least the following twenty-four (24) jurisdictions, in addition to those thirteen (13) cited previously, continue to employ, as a permissive inference, this principle of law, the Fourth Circuit's declaration of its demise would seem to have been greatly exaggerated. *See e.g. Prock v. State,* 471 So.2d 519 (Ala.Crim.App.1985); *State v. Anonymous,* (83-FG), 190 Conn. 715, 463 A.2d 533 (1983); *Scobee v. State,* 488 So.2d 595 (Fla.1st DCA 1986); *Dearmore v. State,* 196 Ga.App. 864, 397 S.E.2d 200 (1990); *State v. Hoffman,* 190 Idaho 127, 705 P.2d 1082 (Idaho Ct.App.1985); *People v. Tyson,* 137 Ill.App.3rd 912, 485 N.E.2d 523 (Ill.App.2 Dist.1985); *State v. Hall,* 371 N.W.2d 187 (Iowa Ct.App.1985); *Grant v. State,* 318 Md. 672, 569 A.2d 1237 (1990); *Commonwealth v. Wilbur,* 353 Mass. 376, 231 N.E.2d 919 (1967), *cert. denied,* 390 U.S. 1010 (1968); *People v. Miller,* 141 Mich.App. 637, 367 N.W.2d 892 (1985); *State v. Ferraro,* 290 N.W.2d 177 (Minn.1980); *Weaver v. State,* 481 So.2d 832 (Miss.1985); *State v. Kramp,* 200 Mont. 383, 651 P.2d 614 (1982); *Gibson v. State,* 96 Nev. 48, 604 P.2d 814 (1980); *State v. Thomas,* 103 N.J. Super. 154, 246 A.2d 746 (1968); *People v. Angel,* 158 A.D.2d 145, 558 N.Y.S.2d 489 (A.D. 1 Dept.1990), *appeal denied,* 77 N.Y.2d 836, 567 N.Y.S.2d 204, 568 N.E.2d 653 (N.Y.1991); *State v. Hogie,* 454 N.W.2d 501 (N.D.1990); *State v. Wilson,* 21 Ohio App.3rd 171, 486 N.E.2d 1242 (1985); *State v. Land,* 681 S.W.2d 589 (Tenn.Cr.App.1984); *State v. Beyer,* 129 Vt. 472, 282 A.2d 819 (1971); *Crews v. Commonwealth,* 3 Va.App. 531, 352 S.E.2d 1 (1987); *State v. Craft,* 165 W.Va. 741, 272 S.E.2d 746 (1980);

State v. Williams, 104 Wis.2d 15, 310 N.W.2d 601 (1981); *Jennings v. State,* 806 P.2d 1299 (Wyo.1991).

In light of this solid line of precedent, the States joined herein as amicus would urge this Court to grant certiorari, so that the continuing vitality of this common-law presumption may be vindicated. As suggested previously, the Fourth Circuit's condemnation of this principle of law was unnecessary and unjustified, and can be said to have cast a cloud over larceny prosecutions nationwide. A legal principle which is so consistently applied in so many state court jurisdictions cannot be unilaterally abolished at the hands of a federal court of appeals, unmindful of the constraints of comity. The "growing discontent" perceived by the federal court in *West* relates not to the states' unease with the common-law presumption relating to the possession of stolen property, but, rather, to the states' understandable frustration with a federal court's presumptuous rule-making. *Cf. Engle v. Isaac,* 456 U.S. 107, 128-9, n.33 (1982). Like this Court's recent decision, *Coleman v. Thompson,* 500 ___U.S.___, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1990), this is a case about federalism, and concerns the respect that federal courts owe the states. In light of the actions of the federal court *sub judice,* the States joined herein as amicus have no recourse but to ask this Court to intervene and the redress the balance in our federal system.

CONCLUSION

The States joined herein as amicus curiae urge this Honorable Court to grant the petition for writ of certiorari filed on behalf of the State of Virginia.

Respectfully submitted,

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APPENDIX

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